

1976 or the section 415(c)(1) limitation applicable to G for the limitation year ending with or within such taxable year) would be the maximum excludable contribution E could make for section 403(b) annuity contracts on G's behalf for the limitation year ending with or within taxable year 1976. However, because E is an organization described in section 415(c)(4), G may make a special election with respect to amounts contributed on G's behalf by E for section 403(b) annuity contracts for the limitation year ending with or within taxable year 1976. Because G has separated from the service of E during such taxable year, G may elect the "(A) election limitation" as well as the "(B) election limitation" or the "(C) election limitation". If G elects the "(A) election limitation" for the limitation year ending with or within taxable year 1976, E could contribute up to \$5,000 ($(.20 \times \$12,000 \times 10) - \$19,000$) on G's behalf for section 403(b) annuity contracts for such limitation year without increasing G's gross income for the taxable year with or within which such limitation year ends. If G elects the "(B) election limitation" for such limitation year, E could contribute \$7,000 (the least of \$7,000 (the amount described in section 415(c)(4)(B)(i)); \$14,000 (the amount described in section 415(c)(4)(B)(ii)); and \$15,000 (the amount described in section 415(c)(4)(B)(iii))). If G elects the "(C) election limitation" for taxable year 1976, E could contribute \$3,000 (the lesser of the amounts described in section 415(c)(1) (A) or (B)).

(d) *Plan year.* For purposes of section 415 and this section, an annuity contract described in section 403(b) shall be deemed to have a plan year coinciding with the taxable year of the individual on whose behalf the contract has been purchased unless that individual demonstrates that a different 12-month period should be considered to be the plan year.

(e) *Effective date.* The provisions of this section are applicable for taxable years beginning in and for limitation years ending with or within taxable years beginning in 1976.

(Sec. 415(c)(4)(D) of the Internal Revenue Code of 1954 (88 Stat. 983; 26 U.S.C. 415(c)(4)(D)))

[T.D. 7442, 41 FR 52296, Nov. 29, 1976, as amended by T.D. 7531, 43 FR 1065, Jan. 6, 1978]

PART 12—TEMPORARY INCOME TAX REGULATIONS UNDER THE REVENUE ACT OF 1971

Sec.

- 12.3 Investment credit, public utility property elections.
- 12.4 Election of Class Life Asset Depreciation Range System (ADR).
- 12.7 Election to be treated as a DISC.
- 12.8 Elections with respect to net leases of real property.
- 12.9 Election to postpone determination with respect to the presumption described in section 183(d).

AUTHORITY: 26 U.S.C. 167, 263, and 7805.

§ 12.3 Investment credit, public utility property elections.

(a) *Elections—(1) In general.* Under section 46(e), three elections may be made on or before March 9, 1972, with respect to section 46(e) property (as defined in subparagraph (3) of this paragraph). An election made under the provisions of section 46(e) shall be irrevocable.

(2) *Applicability of elections.* (i) Any election under section 46(e) shall be made with respect to all of the taxpayer's property eligible for the election whether or not the taxpayer is regulated by more than one regulatory body.

(ii)(a) Paragraph (1) of section 46(e) shall apply to all of the taxpayer's section 46(e) property in the absence of an election under paragraph (2) or (3) of section 46(e). If an election is made under paragraph (2) of section 46(e), paragraph (1) of such section shall not apply to any of the taxpayer's section 46(e) property.

(b) An election made under the last sentence of section 46(e)(1) shall apply to that portion of the taxpayer's section 46(e) property to which paragraph (1) of section 46(e) applies and which is short supply property within the meaning of § 1.46-5(b)(2) of this chapter (Income Tax Regulations) as set forth in a notice of proposed rule making published in 37 FR 3526 on February 17, 1971.

(iii) If a taxpayer makes an election under paragraph (2) of section 46(e), and makes no election under paragraph (3) of such section, the election under paragraph (2) of section 46(e) shall

apply to all of its section 46(e) property.

(iv) If a taxpayer makes an election under paragraph (3) of section 46(e), such election shall apply to all of the taxpayer's section 46(e) property to which section 167(l)(2)(C) applies. Paragraph (1) or (2) of section 46(e) (as the case may be) shall apply to that portion of the taxpayer's section 46(e) property which is not property to which section 167(l)(2)(C) applies. Thus, for example, if a taxpayer makes an election under paragraph (2) of section 46(e), and also makes an election under paragraph (3) of section 46(e), paragraph (3) shall apply to all of the taxpayer's section 46(e) property to which section 167(l)(2)(C) applies and paragraph (2) shall apply to the remainder of the taxpayer's section 46(e) property.

(3) *Section 46(e) property.* "Section 46(e) property" is section 38 property which is both property described in section 50 and is—

(i) Public utility property within the meaning of section 46(c)(3)(B) (other than nonregulated communication property of the type described in the last sentence of section 46(c)(3)(B)), or

(ii) Property used predominantly in the trade or business of the furnishing or sale of (a) steam through a local distribution system or (b) the transportation of gas or steam by pipeline, if the rates for such furnishing or sale are established or approved by a governmental unit, agency, instrumentality, or commission described in section 46(c)(3)(B).

(b) *Method of making elections.* A taxpayer may make the elections described in section 46(e) by filing a statement, on or before March 9, 1972, with the district director or director of the internal revenue service center with whom the taxpayer ordinarily files its income tax return. For rules in the case of taxpayers filing consolidated returns, see § 1.1502-77(a) of this chapter (Income Tax Regulations). Such statement shall contain the following information:

(1) The name, address, and taxpayer identification number of the taxpayer,

(2) The paragraph (or paragraphs) of section 46(e) under which the taxpayer is making the election,

(3) If an election is made under the last sentence of section 46(e)(1), the name and address of all regulatory bodies which have jurisdiction over the taxpayer with respect to the section 46(e) property covered by such election and a statement setting forth the type of the public utility activity described in section 46(e)(5)(B) in which the taxpayer engages, and

(4) If an election is made under paragraph (3) of section 46(e), a statement indicating whether an election has been made by the taxpayer under section 167(l)(4)(A).

[T.D. 7161, 37 FR 3511, Feb. 17, 1972]

§ 12.4 Election of Class Life Asset Depreciation Range System (ADR).

(a) *Elections filed before February 1, 1972.* No election or tax return shall be filed which does not conform to section 109 of the Revenue Act of 1971 (Pub. L. 92-178, 85 Stat. 508). If a taxpayer has before February 1, 1972 filed an election and a tax return in accordance with § 1.167(a)-11 of this chapter (relating to depreciation allowances using the Asset Depreciation Range System published in the FEDERAL REGISTER for June 23, 1971), such election will be treated as an election under the Class Life Asset Depreciation Range System (ADR) as contained in section 109 of the Revenue Act of 1971 and the proposed amendments to § 1.167(a)-11 of this chapter published in the FEDERAL REGISTER for January 27, 1972, provided that the election conforms with the provisions of the Class Life Asset Depreciation Range System (ADR) contained in section 109 of the Revenue Act of 1971 and the amendments to the regulations as finally adopted. Such an election and the determination of tax liability on the tax return are subject to the terms and conditions of section 109 of the Revenue Act of 1971 and the final regulations prescribing the Class Life Asset Depreciation Range System (ADR). (For revocation of an election, see paragraph (c) of this section.) An election and tax return filed before February 1, 1972, which does not conform with the final regulations prescribing the Class Life Asset Depreciation Range System (ADR) is an invalid election unless corrected by an amended tax return and election filed no later

than the time permitted by paragraph (c) of this section. If a valid election under § 1.167(a)-11 of this chapter is not filed for a taxable year, the taxpayer is required to file or amend his tax return and determine tax liability for the taxable year without regard to § 1.167(a)-11 of this chapter.

(b) *Elections filed after January 31, 1972.* No election or tax return shall be filed which does not conform with section 109 of the Revenue Act of 1971. An election and tax return filed under § 1.167(a)-11 of this chapter after January 31, 1972, and before the final amendments to the regulations are published in the FEDERAL REGISTER, should be filed in accordance with section 109 of the Revenue Act of 1971 and the proposed amendments to § 1.167(a)-11 of this chapter relating to the Class Life Asset Depreciation Range System (ADR). Such election and the determination of tax liability on the tax return are subject to the terms and conditions of section 109 of the Revenue Act of 1971 and the final regulations prescribing the Class Life Asset Depreciation Range System (ADR). An election and tax return filed after January 31, 1972, which does not conform with the final regulations prescribing the Class Life Asset Depreciation Range System (ADR), is not a valid election unless corrected by an amended tax return and election filed no later than the time permitted by paragraph (c) of this section. (For revocation of election, see paragraph (c) of this section.) If a valid election under § 1.167(a)-11 of this chapter is not filed for a taxable year the taxpayer is required to file or amend his tax return and determine tax liability for the taxable year without regard to § 1.167(a)-11 of this chapter.

(c) *Special rule for election and revocation.* Notwithstanding the rules of § 1.167(a)-11 of this chapter, a taxpayer is permitted to make, amend or revoke an election under § 1.167(a)-11 of this chapter at any time before the latest of (1) the time the taxpayer files his first return for the taxable year of election, (2) 120 days after the final regulations prescribing the Class Life Asset Depreciation Range System (ADR) are published in the FEDERAL REGISTER, or (3) the time prescribed by law (including

extensions thereof) for filing the return for the taxable year of election. The notification of amendment or revocation of an election shall be made by filing an amended tax return with the Internal Revenue Service Center with which the election was filed. The election should be filed in the manner specified in the Class Life Asset Depreciation Range System (ADR) regulations as finally prescribed.

(d) *Examples.* The principles of this section may be illustrated by the following examples:

Example (1). Taxpayer A filed an election under § 1.167(a)-11 before February 1, 1972. A elected to use the modified half-year convention by treating all assets as placed in service on the first day of the second quarter of the taxable year, excluded section 1250 property (as defined in section 1250(c)) and property used predominantly outside the United States from the election, and included "subsidiary assets" (as defined in § 1.167(a)-11(b)(5)(vii) of the proposed amendments to the regulations) in the election. A's election does not conform with the regulations under § 1.167(a)-11 as proposed to be amended. A should file an amended return and election within 120 days after the publication of the final Class Life Asset Depreciation Range System (ADR) regulations under § 1.167(a)-11. Such amended return and election must conform to the final amendments to the regulations. In the amended election, A must adopt one of the conventions permitted by the final amendments. Assuming the proposed amendments are finally adopted, A may exclude his subsidiary assets from the election provided the conditions of paragraph (b)(5)(vii) of § 1.167(a)-11 of the regulations, as proposed to be amended, are met, and A must include property used predominantly outside the United States in the election unless paragraph (b)(5)(iii), (v), or (vi) of § 1.167(a)-11, as proposed to be amended, permit the exclusion of the property. Generally, A must include section 1250 property in the election unless paragraph (b)(5)(vi) of § 1.167(a)-11, as proposed to be amended, permits the exclusion of the property.

Example (2). Taxpayer B filed an election to compute depreciation under § 1.167(a)-11 before February 1, 1972. B elected to use the half-year convention and has no assets used predominantly outside the United States. B excluded section 1250 property from the election and included his subsidiary assets in the election. Assume that the provisions of paragraph (b)(5)(vi) of § 1.167(a)-11, as proposed to be amended, apply and permit the exclusion of section 1250 property and that B does not elect to exclude subsidiary assets pursuant to paragraph (b)(5)(vii), as proposed to be

amended. B has no assets which were excluded from the election under paragraph (b)(5)(v) of § 1.167(a)-11, as proposed to be amended. The election which was filed before February 1, 1972, will be treated as a valid election under the Class Life Asset Depreciation Range System (ADR) as contained in the final amendments to the regulations, if it conforms with those amendments. B need not file an amended election provided his election conforms to the final regulations under § 1.167(a)-11. However, B may file an amended election within 120 days after the final regulations under § 1.167(a)-11 are published in the FEDERAL REGISTER in order to include section 1250 property, or to exclude subsidiary assets, or to make other changes, or to revoke the election.

[T.D. 7159, 37 FR 1469, Jan. 29, 1972]

§ 12.7 Election to be treated as a DISC.

(a) *Manner and time of election*—(1) *Manner*—(i) *In general*. A corporation can elect to be treated as a DISC under section 992(b) for a taxable year beginning after December 31, 1971. Except as provided in subdivision (ii) of this subparagraph, the election is made by the corporation filing Form 4876 with the service center with which it would file its income tax return if it were subject for such taxable year to all the taxes imposed by subtitle A of the Internal Revenue Code of 1954, and a copy of the completed Form 4876 with the Commissioner of Internal Revenue (attention: ACTS:A:AO), Washington, D.C. 20224. The form shall be signed by any person authorized to sign a corporation return under section 6062, and shall contain the information required by such form. Except as provided in paragraphs (b)(3) and (c) of this section, such election to be treated as a DISC shall be valid only if the consent of every person who is a shareholder of the corporation as of the beginning of the first taxable year for which such election is effective is on or attached to such Form 4876 when filed with the service center.

(ii) *Transitional rule for corporations electing during 1972*. If the first taxable year for which an election by a corporation to be treated as a DISC is a taxable year beginning after December 31, 1971, and on or before December 31, 1972, such election may be made either in the manner prescribed in subdivision (i) of this subparagraph or by filing, at the place prescribed in subdivision (i) of this subparagraph, a statement cap-

tioned "Election to be Treated as a DISC". Such statement of election shall be valid only if the consent of each shareholder is filed with the service center in the form, and at the time, prescribed in paragraph (b) of this section. Such statement shall be signed by any person authorized to sign a corporation return under section 6062 and shall include the name, address, and employer identification number (if known) of the corporation, the beginning date of the first taxable year for which the election is effective, the number of shares of stock of the corporation issued and outstanding as of the earlier of the beginning of the first taxable year for which the election is effective or the time the statement is filed, the number of shares held by each shareholder as of the earlier of such dates, and the date and place of incorporation. As a condition of the election being effective, a corporation which elects to become a DISC by filing a statement in accordance with this subdivision must furnish (to the service center with which the statement was filed) such additional information as is required by Form 4876 by March 31, 1973.

(2) *Time of making election*—(i) *In general*. In the case of a corporation making an election to be treated as a DISC for its first taxable year, such election shall be made within 90 days after the beginning of such taxable year. In the case of a corporation which makes an election to be treated as a DISC for any taxable year beginning after March 31, 1972 (other than the first taxable year of such corporation), the election shall be made during the 90-day period immediately preceding the first day of such taxable year.

(ii) *Transitional rules for certain corporations electing during 1972*. In the case of a corporation which makes an election to be treated as a DISC for a taxable year beginning after December 31, 1971, and on or before March 31, 1972 (other than its first taxable year), the election shall be made within 90 days after the beginning of such taxable year.

(b) *Consent by shareholders*—(1) *In general*—(i) *Time and manner of consent*. Under paragraph (a)(1)(i) of this section, subject to certain exceptions, the

election to be treated as a DISC is not valid unless each person who is a shareholder as of the beginning of the first taxable year for which the election is effective signs either the statement of consent on Form 4876 or a separate statement of consent attached to such form. A shareholder's consent is binding on such shareholder and all transferees of his shares and may not be withdrawn after a valid election is made by the corporation. In the case of a corporation which files an election to become a DISC for a taxable year beginning after December 31, 1972, if a person who is a shareholder as of the beginning of the first taxable year for which the election is effective does not consent by signing the statement of consent set forth on Form 4876, such election shall be valid (except in the case of an extension of the time for filing granted under the provisions of subparagraph (3) of this paragraph or paragraph (c) of this section) only if the consent of such shareholder is attached to the Form 4876 upon which such election is made.

(ii) *Form of consent.* A consent other than the statement of consent set forth on Form 4876 shall be in the form of a statement which is signed by the shareholder and which sets forth (a) the name and address of the corporation and of the shareholder and (b) the number of shares held by each such shareholder as of the time the consent is made and (if the consent is made after the beginning of the corporation's taxable year for which the election is effective) as of the beginning of such year. If the consent is made by a recipient of transferred shares pursuant to paragraph (c) of this section, the statement of consent shall also set forth the name and address of the person who held such shares as of the beginning of such taxable year and the number of such shares. Consent shall be made in the following form: "I (insert name of shareholder), a shareholder of (insert name of corporation seeking to make the election) consent to the election of (insert name of corporation seeking to make the election) to be treated as a DISC under section 992(b) of the Internal Revenue Code. The consent so made by me is irrevocable and is binding upon all transferees of my shares in

(insert name of corporation seeking to make the election)." The consents of all shareholders may be incorporated in one statement.

(iii) *Who may consent.* Where stock of the corporation is owned by a husband and wife as community property (or the income from such stock is community property), or is owned by tenants in common, joint tenants, or tenants by the entirety, each person having a community interest in such stock or the income therefrom and each tenant in common, joint tenant, and tenant by the entirety must consent to the election. The consent of a minor shall be made by his legal guardian or by his natural guardian if no legal guardian has been appointed. The consent of an estate shall be made by the executor or administrator thereof. The consent of a trust shall be made by the trustee thereof. The consent of an estate or trust having more than one executor, administrator, or trustee may be made by any executor, administrator, or trustee authorized to make a return of such estate or trust pursuant to section 6012(b)(5). The consent of a corporation or partnership shall be made by an officer or partner authorized pursuant to section 6062 or 6063, as the case may be, to sign the return of such corporation or partnership. In the case of a foreign person, the consent may be signed by any individual (whether or not a U.S. person) who would be authorized under sections 6061 through 6063 to sign the return of such foreign person if he were a U.S. person.

(2) *Transitional rule for corporations electing during 1972.* In the case of a corporation which files an election to be treated as a DISC for a taxable year beginning after December 31, 1971, and on or before December 31, 1972, such election shall be valid only if the consent of each person who is a shareholder as of the beginning of the first taxable year for which such election is effective is filed with the service center with which the election was filed within 90 days after the first day of such taxable year or within the time granted for an extension of time for filing such consent. The form of such consent shall be the same as that prescribed in subparagraph (1) of this paragraph. Such consent shall be attached to the

statement of election or shall be filed separately (with such service center) with a copy of the statement of election. An extension of time for filing a consent may be granted in the manner, and subject to the conditions, described in subparagraph (3) of this paragraph.

(3) *Extension of time to consent.* An election which is timely filed and would be valid except for the failure to attach the consent of any shareholder to the Form 4876 upon which the election was made or to comply with the 90-day requirement in subparagraph (2) of this paragraph or paragraph (c)(1) of this section, as the case may be, will not be invalid for such reason if it is shown to the satisfaction of the service center that there was a reasonable cause for the failure to file such consent, and if such shareholder files a proper consent to the election within such extended period of time as may be granted by the Internal Revenue Service. In the case of a late filing of a consent, a copy of the Form 4876 or statement of election shall be attached to such consent and shall be filed with the same service center as the election. The form of such consent shall be the same as that set forth in paragraph (b)(1)(ii) of this section. In no event can any consent be made pursuant to this paragraph on or after the last day of the first taxable year for which a corporation elects to be treated as a DISC.

(c) *Consent by holder of transferred shares—(1) In general.* If a shareholder of a corporation transfers—

(i) Prior to the first day of the first taxable year for which such corporation elects to be treated as a DISC, some or all of the shares held by him without having consented to such election, or

(ii) On or before the 90th day after the first day of the first taxable year for which such corporation elects to be treated as a DISC, some or all of the shares held by him as of the first day of such year (or if later, held by him as of the time such shares are issued), without having consented to such election, then consent may be made by any recipient of such shares on or before the 90th day after the first day of such first taxable year. If such recipient fails to file his consent on or before such 90th day, an extension of time for filing

such consent may be granted in the manner, and subject to the conditions, described in paragraph (b)(3) of this section. In addition, if the transfer occurs more than 90 days after the first day of such taxable year, an extension of time for filing such consent may be granted to such recipient only if it is determined under paragraph (b)(3) of this section that an extension of time would have been granted the transferor for the filing of such consent if the transfer had not occurred. A consent which is not attached to the original Form 4876 or statement of election (as the case may be) shall be filed with the same service center as the original Form 4876 or statement of election and shall have attached a copy of such original form or statement of election. The form of such consent shall be the same as that set forth in paragraph (b)(1)(ii) of this section. For the purposes of this paragraph, a transfer of shares includes any sale, exchange, or other disposition, including a transfer by gift or at death.

(2) *Requirement for the filing of an amended form 4876 or statement of election.* In any case in which a consent to a corporation's election to be treated as a DISC is made pursuant to subparagraph (1) of this paragraph, such corporation must file an amended form 4876 or statement of election (as the case may be) reflecting all changes in ownership of shares. Such form must be filed with the same service center with which the original form 4876 or statement of election was filed by such corporation.

(d) *Effect of election—(1) Effect on corporation.* A valid election to be treated as a DISC remains in effect (without regard to whether the electing corporation qualifies as a DISC for a particular year) until terminated by any of the methods provided in paragraph (e) of this section. While such election is in effect, the electing corporation is subject to sections 991 through 997 and other provisions of the code applicable to DISC's for any taxable year for which it qualifies as a DISC (or is treated as qualifying as a DISC pursuant to section 992(a)(2)). Such corporation is also subject to such provisions for any taxable year for which it is treated as a former DISC as a result of

qualifying or being treated as a DISC for any taxable year for which such election was in effect.

(2) *Effect on shareholders.* A valid election by a corporation to be treated as a DISC subjects the shareholders of such corporation to the provisions of section 995 (relating to the taxation of the shareholders of a DISC or former DISC) and to all other provisions of the code relating to the shareholders of a DISC or former DISC. Such provisions of the code apply to any person who is a shareholder of a DISC or former DISC whether or not such person was a shareholder at the time the corporation elected to become a DISC.

(e) *Termination of election*—(1) *In general.* An election to be treated as a DISC is terminated only as provided in subparagraph (2) or (3) of this paragraph.

(2) *Revocation of election*—(i) *Manner of revocation.* An election by a corporation to be treated as a DISC may be revoked by the corporation for any taxable year of the corporation after the first taxable year for which the election is effective. Such revocation shall be made by the corporation filing a statement that the corporation revokes its election under section 992(b) to be treated as a DISC. Such statement shall indicate the corporation's name, address, employer identification number, and the first taxable year of the corporation for which the revocation is to be effective. The statement shall be signed by any person authorized to sign a corporation return under section 6062. Such revocation shall be filed with the service center with which the corporation filed its election, except that, if it filed an annual information return under section 6011(e)(2), the revocation shall be filed with the service center with which it filed its last such return.

(ii) *Years for which revocation is effective.* If a corporation files a statement revoking its election to be treated as a DISC during the first 90 days of a taxable year (other than the first taxable year for which such election is effective), such revocation will be effective for such taxable year and all taxable years thereafter. If the corporation files a statement revoking its election to be treated as a DISC after the first

90 days of a taxable year, the revocation will be effective for all taxable years following such taxable year.

(3) *Continued failure to be a DISC.* If a corporation which has elected to be treated as a DISC does not qualify as a DISC (and is not treated as a DISC pursuant to section 992(a)(2)) for each of any 5 consecutive taxable years, such election terminates and will not be effective for any taxable year after such 5th taxable year. Such termination will be effective automatically, without notice to such corporation or to the Internal Revenue Service. If, during any 5-year period for which an election is effective, the corporation should qualify as a DISC (or be treated as a DISC pursuant to section 992(a)(2)) for a taxable year, a new 5-year period shall automatically start at the beginning of the following taxable year.

(4) *Election after termination.* If a corporation has made a valid election to be treated as a DISC and such election terminates in either manner described in subparagraph (2) or (3) of this paragraph, such corporation is eligible to reelect to be treated as a DISC at any time by following the procedures described in paragraphs (a) through (c) of this section. If a corporation terminates its election and subsequently reelects to be treated as a DISC, the corporation and its shareholders continue to be subject to sections 995 and 996 with respect to the period during which its first election was in effect. Thus, for example, distributions upon disqualification includible in the gross incomes of shareholders of a corporation pursuant to section 995(b)(2) continue to be so includible for taxable years for which a second election of such corporation is in effect without regard to the second election.

[T.D. 7237, 37 FR 28626, Dec. 28, 1972]

§ 12.8 Elections with respect to net leases of real property.

(a) *In general.* The elections described in this section are available for determining whether real property held by the taxpayer is subject to a net lease for purposes of section 57 (relating to items of tax preference for purposes of the minimum tax for tax preferences) or 163(d) (relating to limitation on interest on investment indebtedness).

Under sections 57(c)(1)(A) and 163(d)(4)(A)(i), property will be considered to be subject to a net lease for a taxable year where the sum of the deductions of the lessor with respect to the property for the taxable year allowable solely by reason of section 162 (other than rents and reimbursed amounts with respect to the property) is less than 15 percent of the gross income from rents produced by the property (hereinafter referred to as the "expense test"). Under sections 57(c)(2) and 163(d)(7)(A), where a parcel of real property of the taxpayer is leased under two or more leases, the taxpayer may elect to apply the expense test set forth in sections 57(c)(1)(A) and 163(d)(4)(A)(i) by treating all leased portions of such property as subject to a single lease. Under sections 57(c)(3) and 163(d)(7)(B), at the election of the taxpayer, the expense test set forth in sections 57(c)(1)(A) and 163(d)(4)(A)(i) shall not apply with respect to real property of the taxpayer which has been in use for more than 5 years.

(b) *Election with respect to multiple leases of single parcel of real property.* If a parcel of real property of the taxpayer is leased under two or more leases, the expense test referred to in paragraph (a) of this section shall, at the election of the taxpayer, be applied by treating all leased portions of such property as subject to a single lease. For purposes of this paragraph, the term "parcel of real property" includes adjacent properties each of which is subject to lease.

(c) *Election with respect to real property in use for more than 5 years.* At the election of the taxpayer, the expense test referred to in paragraph (a) of this section shall not apply with respect to real property of the taxpayer which has been in use for more than 5 years. For this purpose, real property is in use only during the period that such property is both owned and used for commercial purposes by the taxpayer. If an improvement to the property was made during the time such property was owned by the taxpayer, and if, as a result of such improvement, the adjusted basis of such property was increased by 50 percent or more, use of such property for commercial purposes shall be deemed to have commenced for pur-

poses of this paragraph as of the date such improvement was completed. An election under this paragraph shall apply to all real property of the taxpayer which has been in use for more than 5 years.

(d) *Procedure for making election—(1) Time and scope of election.* An election under paragraph (b) or (c) of this section shall be made for each taxable year to which such election is to apply. The election must be made before the later of (i) the time prescribed by law for filing the taxpayer's return for the taxable year for which the election is made (determined with regard to any extension of time) or (ii) August 31, 1973, but the election may not be made after the expiration of the time prescribed by law for the filing of a claim for credit or refund of tax with respect to the taxable year for which the election is to apply.

(2) *Manner of making election.* Except as provided in the following sentence, an election by the taxpayer with respect to a taxable year shall be made by a statement containing the information described in paragraph (d)(3) of this section which is—

(i) Attached to the taxpayer's return or amended return for such taxable year,

(ii) Attached to a timely filed claim by the taxpayer for credit or refund of tax for such taxable year, or

(iii) Filed by the taxpayer with the director of the Internal Revenue Service Center where the return for such taxable year was filed.

In the case of a taxable year ending before July 1, 1973, no formal statement of election is necessary if the taxpayer's return took into account an election under paragraph (b) or (c) of this section; the taxpayer will be considered to have made an election in accordance with the manner in which leases with respect to parcels of real property described in paragraph (b) of this section, or leases of property which has been in use for more than 5 years as described in paragraph (c) of this section, are treated in the return.

(3) *Statement.* The statement described in paragraph (d)(2) of this section shall contain the following information:

(i) The name, address, and taxpayer identification number of the taxpayer;

(ii) The taxable year to which the election is to apply if the statement is not attached to the return or a claim for credit or refund;

(iii) A description of any leases which are to be treated as a single lease; and

(iv) A description of any real property in use for more than 5 years to which the expense test is not to apply.

(4) *Revocation of election.* An election made pursuant to this paragraph may be revoked within the time prescribed in paragraph (d)(1) of this section for making an election and may not be revoked thereafter. Any such revocation shall be made in the manner prescribed by paragraph (d)(2) of this section for the making of an election.

(e) *Election by members of partnership.* Under section 703(b) (as amended by section 304(c) of the Revenue Act of 1971), any election under section 57(c) or 163(d)(7) with respect to property held by a partnership shall be made by each partner separately, rather than by the partnership. If an election made by a taxpayer under paragraph (b) of this section applies in whole or in part to property held by a partnership, the taxpayer shall, in applying the expense test referred to in paragraph (a) of this section, take into account his distributive share of the deductions of the partnership with respect to the property for the taxable year allowable solely by reason of section 162 (other than rents and reimbursed amounts with respect to the property) and also his distributive share of the partnership's rental income from such property for the taxable year.

[T.D. 7271, 38 FR 9296, Apr. 13, 1973]

§ 12.9 Election to postpone determination with respect to the presumption described in section 183(d).

(a) *In general.* An individual, electing small business corporation, trust or estate may elect in accordance with the rules set forth in this section to postpone a determination whether the presumption described in section 183(d) applies with respect to any activity in which the taxpayer engages until after the close of the fourth taxable year (sixth taxable year, in the case of an activity described in § 1.183-1(c)(3)) fol-

lowing the taxable year in which the taxpayer first engages in such activity. The election must be made in accordance with the applicable requirements of paragraphs (b), (c) and (d) of this section. Except as otherwise provided in paragraphs (c) and (e) of this section, an election made pursuant to this section shall be binding for the first taxable year in which the taxpayer first engages in the activity and for all subsequent taxable years in the five (or seven) year period referred to in the first sentence of this paragraph. For purposes of this section, a taxpayer shall be treated as not having engaged in an activity during any taxable year beginning before January 1, 1970.

(b) *Period to which an election applies.* An individual, trust, estate, or small business corporation may make the election. The five year presumption period (seven year presumption period in the case of an activity described in § 1.183-1(c)(3)) to which the election shall apply shall be the five (or seven) consecutive taxable years of such taxpayer beginning with the taxable year in which such taxpayer first engages in the activity. For purposes of this section, a taxpayer who engages in an activity as a partner, engages in it in each of his taxable years with or without which ends a partnership year during which the activity was carried on by the partnership.

(c) *Time for making an election.* A taxpayer who is an individual, trust, estate or small business corporation may make the election provided in § 183(e) by filing the statement and consents required by paragraph (d) of this section within—

(1) 3 years after the due date of such taxpayer's return (determined without extensions) for the taxable year in which such taxpayer first engages in the activity, but not later than

(2) 60 days after such taxpayer receives a written notice (if any) from a district director that the district director proposes to disallow deductions attributable to an activity not engaged in for profit under section 183.

The provisions of paragraph (c)(2) of this section shall in no event be construed to extend the period described in (c)(1) of this section for making such

election. Notwithstanding the time periods prescribed in paragraph (c) (1) and (2) of this section, if no election has been made before a suit or proceeding described in section 7422(a) is maintained or a petition is filed in the Tax Court for a redetermination of a deficiency for any taxable year within the presumption period to which the election would apply, no election may be made except with the consent of the Commissioner which will not be given unless no appreciable delay in the suit or proceeding will be caused.

(d) *Manner of making election.* (1) The election shall be made by the individual, trust, estate, or electing small business corporation, as the case may be, engaged in the activity, by filing a statement which sets forth the following information—

(i) The name, address, and taxpayer identification number of such taxpayer, and, if applicable, of the partnership in which he engages in the activity,

(ii) A declaration stating that the taxpayer elects to postpone a determination as to whether the presumption described in section 183(d) applies until after the close of the taxpayer's fourth taxable year (sixth taxable year, in the case of an activity described in § 1.183-1(c)(3)) following the taxable year in which the taxpayer first engaged in such activity and identifying that first such taxable year, and,

(iii) A description of each activity (as defined in § 1.183-1(d)(1)) with respect to which the election is being made.

(2) For an election to be effective, there must be attached to the statement properly executed consents, in the form prescribed by the Commissioner, extending the period prescribed by section 6501 for the assessment of any tax to a date which is not earlier than 18 months after the due date of the return (determined without extensions) for the final year in the presumption period to which the election applies, as follows:

(i) Consents for each of the taxpayer's taxable years in the presumption period to which the election applies,

(ii) If the election is made by an electing small business corporation, a consent of each person who is a share-

holder during any taxable year to which the election applies, for each of such shareholder's taxable years with or within which end each of the corporation's taxable years in the presumption period,

(iii) If a taxpayer referred to in paragraph (d)(2)(i) of this section or shareholder referred to in paragraph (d)(2)(ii) of this section is married at the time of the election, in the case of his present spouse, a consent for each of such spouse's taxable years which correspond to the taxable years (other than prior years of the shareholder during no part of which he was a shareholder) for which consents are required by paragraph (d)(2) (i) or (ii) of this section as the case may be.

Such consents shall not be construed to shorten the period described in section 6501 for any taxable year within the presumption period to which the election applies.

(3) The statement, with the required consents attached, shall be filed—

(i) With the service center at which the taxpayer making the election is required to file his return, or

(ii) If the taxpayer is notified by a district director that, pursuant to section 183 he is proposing to disallow deductions with respect to an activity not engaged in for profit, with such district director.

(e) *Subsequent invalidations.* If, after a timely election has been made, but still within the presumption period, a suit or proceeding (as described in section 7422(a)) is maintained by the electing taxpayer, a shareholder referred to in paragraph (d)(2)(ii) of this section, or spouse referred to in paragraph (d)(2)(iii) of this section for any taxable year for which a consent is required by this section and the taxpayer, shareholder, or spouse has not been issued a notice of deficiency (as described in section 6212(a)) with respect to such taxable year, such election shall not be effective to postpone the determination whether the presumption applies, for such taxable year, but the consents extending the statute of limitations filed with the election shall not thereby be invalidated. The immediately preceding sentence shall not apply to a suit or proceeding maintained by the spouse of an electing taxpayer for a

taxable year for which such spouse has filed a separate return, or a suit or proceeding maintained by a shareholder for a taxable year in which he was not such a shareholder. An election by an individual taxpayer or electing small business corporation, shall be subsequently invalidated for all years in the presumption period to which it had applied if—

(1) The electing taxpayer or shareholder taxpayer files a joint return for one of the first three (five, in the case of an activity described in §1.183-1(c)(3)) taxable years in such presumption period, and

(2) The spouse with whom he files such joint return has not previously executed a consent described in paragraph (d)(2)(iii) of this section, and

(3) Within one year after the filing of such joint return (or, if later, 90 days after March 14, 1974), such spouse has not filed a consent described in paragraph (d)(2) of this section.

An election by an electing small business corporation shall be invalidated for all years in the presumption period to which it applies if a person who was not a shareholder on the date of election becomes a shareholder during the first three (or five) years of the presumption period to which the election applies and does not, within 90 days after the date on which he becomes a shareholder (or, if later, 90 days after March 14, 1974), file a consent required by paragraph (d)(2) of this section. Invalidation of the election by operation of this paragraph will in no case affect the validity of the consents filed with such election.

(f) *Extension of time for filing election in hardship cases.* The Commissioner may upon application by a taxpayer, consent to an extension of time prescribed in this section for making an election if he finds that such an extension would be justified by hardship incurred by reason of the time at which this section is published. The burden will be on the taxpayer to establish that under the relevant facts the Commissioner should so consent.

[T.D. 7308, 39 FR 9947, Mar. 15, 1974]

PART 13—TEMPORARY INCOME TAX REGULATIONS UNDER THE TAX REFORM ACT OF 1969

Sec.

13.0–13.3 [Reserved]

13.4 Arbitrage bonds; temporary rules.

13.5–13.9 [Reserved]

13.10 Distribution of money in lieu of fractional shares.

13.11 Revocation of election to report income on the installment basis.

AUTHORITY: 26 U.S.C. 7805.

§§ 13.0–13.3 [Reserved]

§ 13.4 Arbitrage bonds; temporary rules.

(a) *In general*—(1) *Arbitrage bonds.* Section 103(d)(1) provides that any arbitrage bond (as such term is defined in section 103(d)(2)) shall be treated as an obligation not described in section 103(a)(1). Thus, the interest on an obligation which would have been excluded from gross income pursuant to the provisions of section 103(a)(1) will be included in gross income and subject to Federal income taxation if such obligation is an arbitrage bond. Under section 103(d)(2), an obligation is an arbitrage bond if it is issued by a governmental unit as part of an issue of obligations (for purposes of this section referred to as “governmental obligations”) all or a major portion of the proceeds of which are (i) reasonably expected to be used directly or indirectly to acquire certain obligations or securities (for purposes of this section referred to as “acquired obligations”) which may reasonably be expected, at the time of issuance of such governmental obligations, to produce a yield over the term of the issue of such governmental obligations which is materially higher (taking into account any discount or premium) than the yield on such issue, or (ii) reasonably expected to be used to replace funds which were used directly or indirectly to acquire such acquired obligations. For rules as to industrial development bonds, see section 103(c).

(2) *Definitions.* (i) For purposes of this section, the term “governmental unit” means a State, the District of Columbia, a Territory, or a possession of the